Center for American Progress

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Regulations Division
Office of the General Counsel
Department of Housing and Urban Development
451 7th Street SW
Room 10276
Washington, DC 20410-0001

Submitted electronically via Regulations.gov
RE: Proposed Rule: FR-6111-P-02, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard (RIN 2529-AA98)

To Whom It May Concern:

The Center for American Progress (CAP) takes the opportunity to comment on HUD's Proposed Rule (RIN 2529-AA98) to amend the agency's interpretation of the Fair Housing Act's disparate impact standard.

CAP is a non-partisan think tank dedicated to improving the lives of Americans through bold, progressive ideas and action. As part of its core mission, CAP conducts research and develops new policy ideas that help enhance the economic security of Americans, boost their opportunities for advancement, and promote equality.

In that capacity, we strongly oppose HUD's proposed changes to the disparate impact standard and urge HUD to firmly maintain and enforce—rather than reconsider and dilute—the Fair Housing Act's disparate impact rule.

The Fair Housing Act was passed in April 1968 as Title VIII of the Civil Rights Act with the intent to eliminate overt discrimination and disparities in the housing market and ultimately end residential segregation. The Act prohibits discrimination in the rent or sale of housing; the financing of housing; and the provision of brokerage services based on a person's inclusion in a protected class.[1] The Fair Housing Act prohibits various types of housing market discrimination intentionally undertaken by property owners, real estate and home insurance agents and brokers, and financial institutions. These include, among others, the outright refusal to rent or sell; refusing to negotiate; deceptively denying the availability of housing; steering; refusing to make home mortgage loans; providing limited advertisements; and coercing, intimidating, and threatening based on membership in a protected class.[2] The law also applies to facially-neutral policies and practices that have a negative impact on people of color and other protected classes in the housing market. Under the legal theory of disparate impact, policies and actions are considered discriminatory if they have a disproportionately negative effect on protected classes even if that was not the intent of those actions.

Disparate impact was first used by the Supreme Court as a legal theory in *Griggs v. Duke Power Company.*[3] In that case, the Supreme Court had to establish whether the Duke Power Company's use of aptitude tests to restrict promotions and transfers within the company had a disparate impact on Black employees. While the company claimed that the tests would ensure that its employees were well-educated, this practice actually prevented Black employees from transferring to better-paid positions within the company.

In the past, courts have recognized two types of disparate impact that can be liable under the Fair Housing Act, as explained in *Metropolitan Housing Development Corporation v. Village of Arlington Heights:*[4]

> The first occurs when that decision has a greater adverse impact on one [protected] group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups.

Although, for approximately two decades, the Department of Housing and Urban Development (HUD) had interpreted the FHA as supporting disparate impact claims, no uniform standard and criteria had been established in order for HUD and the eleven courts to determine when a seemingly neutral policy or practice that caused a disparate outcome violated the FHA.[5] In 2013, HUD finally issued a rule, entitled "Implementation of the Fair Housing Act's Discriminatory Effects Standard," which formalized the interpretation of which practices with an unjustified discriminatory effect, including those without a discriminatory intent, are deemed liable.[6] In 2015, the U.S. Supreme Court, in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project Inc.*, ruled that claims of disparate impact are cognizable under the Fair Housing Act.[7]

HUD's legal rationale for its new proposed rule rests in concern regarding possible abuse of disparate impact liability, which was raised in dicta by Justice Kennedy in *Inclusive Communities*. Quoting the *Griggs* decision, Kennedy wrote that "disparate impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies." [8]

HUD's proposed rule would defeat the unique purpose of disparate impact liability under the Fair Housing Act to combat seemingly neutral prejudices that would otherwise avoid classification as disparate treatment, or intentionally discriminatory policies. As the Court states in *Inclusive Communities*, disparate impact liability "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment" and that "disparate impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping."

The proposed rule represents a clear attempt by the Trump Administration at rolling back one of the most critical legal tools available to challenge the harmful policies and practices that create

unjustified barriers for protected classes in the housing market. Today, more than ever, the disparate impact doctrine needs to be upheld to fight the various forms of housing discrimination that are often difficult to detect and prove despite its continuation in perpetuating residential segregation and systemic inequality. As CAP's recent report on racial disparities in home appreciation[9] outlines, racial discrimination in the housing market still exists and is a dynamic, moving target[10] as the overt forms of discrimination that were common in the past have largely shifted and new covert forms of racial bias in the housing market have emerged. For instance, home mortgage lending discrimination now often materializes in widely-used algorithmic scoring[11] and discriminatory online marketing.[12] In addition, steering and redlining have reemerged in the wake of the financial crash of 2008 as commonplace forms of discrimination that can have a significant negative impact on communities of color.[13]

We oppose the proposed rule for the following reasons:

I. It creates insurmountable obstacles to prove discrimination, making it virtually impossible to challenge unfair practices by housing providers, insurance companies, and financial institutions.

Since its inception, the Fair Housing Act has represented a critical tool for achieving more racial integration and combating discrimination. Its enforcement, however, has often been difficult and inadequate,[14] with the burden of fighting against housing segregation typically placed onto the victims of discrimination themselves, who would in-turn seek out the courts for relief.[15] Because discriminatory actions are often concealed, it is difficult for victims of discrimination to recognize any violation of their rights until it is too late.[16] As a result, some incidents of discrimination may not generate any complaints from victims. In some cases, claims may not be always successful because of a lack of fair and uniform standards, as in the case of disparate impact before *Texas Department of Housing and Community Affairs v. Inclusive Communities Project Inc.*[17] A qualitative study of 92 disparate impact claims brought to a federal court of appeals found that in only 18 cases did the plaintiffs achieve positive outcomes.[18]

The proposed rule would shift essentially all the burden of proving that a policy or practice has a disparate impact on the plaintiffs, that is people in protected classes. The current three-part "burden shifting" standard would be modified to add two more components that would make it extremely vexing for plaintiffs to provide the necessary evidence and prove that a housing policy or practice violates or predictably will violate the Fair Housing Act based on disparate impact.[19] By imposing a very high standard on victims of discrimination while making it easier for defendants in disparate impact claims to escape accountability, the proposed rule would make the success of disparate impact claims nearly impossible.

II. It encourages a backdoor to widespread proxy discrimination using statistics and algorithms as well as signals that the profitability of a business' disparate rule, policy, or practice trumps its discriminatory outcome.

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Even if a plaintiff is able to make a successful disparate impact claim, this proposed rule would create a new set of legal defenses that would serve to shield banks, insurance companies, and landlords who use discriminatory algorithmic tools from being held accountable and rectifying disparate outcome, effectively nullifying the plaintiff's claim.[20]

The algorithmic first and third defenses assume that demonstrating the defendants alleged inputs to an algorithmic model are sufficient to allow humans to determine if the algorithmic outcome is discriminatory.[21] The inputs for machine learning algorithms are often now vast quantities of data that would be difficult for humans to assess this statement if given the fully scope of the data and algorithm. Algorithmic models and artificial intelligence research are quickly moving to "models that are often beyond human comprehension"[22] including the currently deployed "artificial general intelligence" and forthcoming "artificial superintelligence" where humans will lack the cognitive ability to understand it.[23]

Additionally, the first defense also "allows the defendant to break down the model piece-by-piece"[24] without mandating any requirements for the defendant to provide the full scope of data and techniques used in the model to the plaintiff for their own analysis and conclusion. This allows a defendant the sole discretion to break down their algorithmic model using the pieces they deem relevant. This could easily exclude data or techniques that might seem unrelated but could be key inputs in causing the algorithmic model to output disparate impact.

The second defense addresses the far more likely scenario that an algorithmic model will not be developed by the defendant themselves but from a recognized third party who is responsible for creating or maintaining the model, such as a vendor. Companies no longer developing algorithmic models in house are increasingly deploying a "best in breed" software strategy to purchase multiple types of cloud-based software from different vendors, with the average company deploying more than 160 software applications.[25]

Allowing defendants to defeat the claim simply by showing that a recognized third party is responsible for the algorithmic model means that defendants are purchasing not just an algorithmic model but also immunity from plaintiff claims of disparate impact. The second defense references but provides little to no information to defendants on how to sue the algorithmic model creator, essentially providing additional immunity to the third party responsible for the algorithmic model.

Furthermore, the proposed rule also appears to signal that a business' discriminatory policy or practice could be justified if **1.)** their actions "advances a valid interest," and **2.)** the plaintiff fails to prove that the defendant can continue its "valid interest"/profitability without discriminating.[26]

These proposed backdoor defenses combined with an impossibly higher burden to make a disparate impact claim will usher in a widespread, emboldened wave of proxy discrimination[27] against millions of people, particularly those who have long faced structural roadblocks to quality housing resources and opportunities, including but not limited to: people with disabilities, people of color, immigrants, families with children and the LGBTQ community.[28] Given the historical and ongoing barriers faced by these groups, they would assuredly be at the greatest risk of being forced to take on costlier, more risky loans — or be denied access to financing altogether.[29] Likewise, an insurance company could use modeling to deny coverage of homes at and below a specific price-point which would in effect disparately impact communities of color whose homes have been arbitrarily and systematically devalued across the nation.[30] Paradoxically, as noted by Federal Trade Commissioner Rohit Chopra, [31] there's no better argument against employing HUD's proposed algorithmic modeling defenses than the fact that the agency is currently embroiled in a lawsuit against Facebook for discriminatory advertising practices that allowed property owners to restrict which user audiences could see ads based on their race, sex, religion, disability, national origin, and other key demographic diversity characteristics.[32]

This type of backdoor discrimination can affect several groups –federally protected and those not yet – who, regardless, are consistently and disproportionately affected such as the LGBTQ community. When it comes to LGBTQ people, year after year, in study after study, findings indicate that discrimination in housing for this community is consistent, rampant, and ubiquitous. A paired-test study conducted by HUD itself indicated that same-sex couples were treated less favorably than heterosexual couples in the rental housing market.[33] Other paired-test studies have found that heterosexual couples were favored over same-sex couples seeking senior housing, and that non-transgender applicants were favored over transgender applicants for rental units.[34]

The findings of disproportionate refusals to LGBTQ people are not limited to rental applications. Research by the Michigan Fair Housing Commission found that different-sex couples were favored over same-sex couples in rental, sales, and mortgage markets, even when the same-sex couples had higher incomes, better credit, and offered larger down payments than the different-sex couple they were paired with.[35] While discrimination occurred most frequently in the rental market, the study noted that discrimination in sales and mortgages may be more difficult to assess as it could take place further along in the transaction.[36] The low reported rates of fair housing complaints related to sexual orientation are likely an undercount of actual rates of discrimination, since individuals may choose not to report instances of discrimination or may not even realize that denials or refusals were based on discrimination.[37] This difficulty to assess or prove discrimination underscores the need to preserve the disparate impact doctrine.

III. The proposed rule perversely incentivizes a return to a predatory business culture of no data collection and therefore no accountability within the housing industry and beyond.

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Not only does the proposed rule changes appear to tip the scale in favor of the defendants accused of discrimination by placing an inordinate and inappropriate burden onto the plaintiffs, but at the same time permits and even perversely incentivizes the lending industry to scale back its collection and disclosure of important data that can reveal discrimination.[38] Unfortunately, this is one of many moves taken of late to roll back federal data collections efforts designed to protect the civil rights of people and communities long preyed upon and harmed by discriminatory business practices.[3940]

IV. Sets a far-reaching, dangerous new precedent that will undermine application of the disparate impact standard and thus threaten civil rights enforcement within education, employment, transportation, healthcare and the criminal justice systems.

Because the disparate impact doctrine is so longstanding, the same rationale and legal arguments have been applied to many policies and regulations across federal agencies. For this reason, any changes to HUD's rule could lead to significant weakening of the enforcement of key civil rights laws by other federal agencies. For example, in the Department of Education, a similar understanding of disparate impact forms the basis of rules and regulations on resource equity, equitable distribution of teachers, access to advanced coursework, and the appropriate use of high-stakes tests. Not only do these rules and regulations provide important recourse for students and families who have been negatively impacted by poorly designed school policies, thus forming a mechanism for civil rights enforcement, but they also send an important signal to schools and districts around the country about the expectation that policy be designed to avoid unintended discriminatory effects. The same is true for rules and regulations developed in other federal agencies such as the Department of Labor, the Department of Transportation, and Health and Human Services and the organizations and people they serve.

Conclusion

Now is a crucial time to aggressively advance and strengthen **not** retract and weaken fair housing protections and gains as the housing crisis is worsening, disproportionately impacting people and communities who continue to be most harmed by historical and contemporary unfair housing policies and practices.[41] For close to 50 years, the disparate impact doctrine has been a critical legal tool in identifying and remedying harmful and inequitable policies/practices that prevent people from equal access to quality opportunities, supports, and resources in housing and beyond. The proposed changes under this rule would effectively gut the Fair Housing Act's crucial impact method of proof in service of making it virtually impossible to challenge discriminatory practices by housing providers, insurance companies, and the banking industry. Not only would these proposed changes eliminate the possibility of challenging systemic and systematic discrimination but it would do so by shifting the burden of proof entirely off of the transgressing perpetrators and onto the housing discrimination victims, consequently deepening prevailing patterns of segregation and socioeconomic inequity. These efforts come in spite of the

2015 Supreme Court decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project (ICP)*, authored by Justice Kennedy, which affirmed Fair Housing Act's existing disparate-impact liability framework.[42] CAP strongly urges HUD to respect the careful, inclusive, and deliberative process that it undertook to fortify the standard in 2013, desist from making its currently proposed changes, and, instead, focus on vigorously advancing the standing rule's effective civil rights enforcement "to moving the Nation toward a more integrated society."[43]

Thank you for the opportunity to submit comments. Please do not hesitate to contact us at mzonta@americanprogress.org to request further information.

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[1] At first, protected classes included race, color, religion, and national origin. With the amendments of 1974 and 1988, three additional protected classes were added: sex, familial status, and disability.

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[3] *Griggs v. Duke Power Co.*, 401 U.S. 424 (March 8, 1971), available at https://www.law.cornell.edu/supremecourt/text/401/424.

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[7] *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507 (June 25, 2015), available at https://www.leagle.com/decision/insco20150625e56.

[8] Ibid.

[9] Michela Zonta, "Racial Disparities in Home Appreciation," (Washington, DC: Center for American Progress, 2019), available at https://www.americanprogress.org/issues/economy/reports/2019/07/15/469838/racial-disparities-home-appreciation/.

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Corrine Yu, "Discrimination's Digital Frontier," *The Atlantic*, April 15, 2019, available at https://www.theatlantic.com/ideas/archive/2019/04/facebook-targeted-marketing-perpetuates-discrimination/587059/.

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[22] David Weinberger, "Our Machines Now Have Knowledge We'll Never Understand," *Wired*, April 18, 2017, available at https://www.wired.com/story/our-machines-now-have-knowledge-well-never-understand/.

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